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No. 03-636

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

GARRISON S. JOHNSON, *Petitioner,*

v.

JAMES GOMEZ and JAMES ROWLAND, *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATE COURT OF APPEALS F OR THE NINTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a state's practice of temporary racial segregation of state prisoners subject to the *Turner v. Safley*, 482 U.S. 78 (1987) test or is it subject to the strict scrutiny standard?

2. Does California's practice of temporary racial segregation of state prisoners violate the Equal Protection Clause?

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STATEMENT OF THE CASE

This case involves the California Department of Corrections' practice concerning initial cell assignments.

When an inmate arrives at a CDC institution, either as a transfer from another facility or as a new inmate, he is initially housed in a reception center. There, the inmate goes through a classification process during which he is given a battery of tests, interviews, and both physical and mental health exams. He is evaluated for potential violence, security concerns, and possible gang affiliation. (Pet. App. 2a-3a).

Inmates at a reception center are typically double-celled; in other words, they share their cell with a cell-mate. To determine the appropriate double-cell housing placement, the CDC looks at several factors including gender, age, classification score, case concerns, custody concerns, mental and physical health, enemy situations,

gang affiliation, background, history, custody designation, and race. While at the reception center, inmates are generally housed with an inmate of the same ethnic race. The CDC considers race when making an initial housing assignment because, in its experience, race is very important to inmates and it plays a significant role in antisocial behavior. (*Id.* at 3a.) Housing in a reception center is temporary, typically for 60 days.

An administrator at California State Prison-Lancaster, where Petitioner was housed, testified that if race were not considered in making this initial housing assignment, she was certain that there would be racially based conflict in the cells and in the prison yard. She was unwilling to knowingly disregard racial factors and place an inmate in jeopardy, and would not compromise inmate safety through actions that she knew would result in violence and conflict. This view was unanimously supported by other prison officials. (*Id.* at 4a.)

The rest of the prison's operations are racially integrated, even for inmates going through the initial classification process. There is no distinction based on race as to jobs, meals, yard and recreational time, or vocational and educational assignments. But the confined nature of the cells makes them potentially more dangerous than the other areas of the prison. Staff cannot see into the cells without going up to them, and inmates sometimes place coverings over the windows so that staff cannot see into them at all. Moreover, inmates are confined to their cells for much of the day. Because of the currently high levels of racial violence in areas where inmates are easily observed, the administrators are concerned that they would not be able to protect inmates who are confined in their cells, if they did not consider race as a factor before completion of the evaluation process. Instead, they insist on having 60 days to analyze each inmate individually to

determine whether the inmate poses a danger to others. (*Id.* at 4a.)

After 60 days, the inmate is either permanently assigned a cell at the current institution, or he is transferred to another institution that better suits his particular needs. If the inmate is transferred, he again goes through the initial housing screening process. If the inmate has the required security classification, he may be assigned to a dormitory or a single cell. (*Id.* at 4a-5a.)

Inmates assigned to a dormitory are considered nonviolent, and, thus, inmates of all races are housed together. The CDC does not use race as a factor to determine who is assigned to a dormitory, but within each dormitory it attempts to maintain a racial balance to reduce the likelihood of racial violence. Single-cell housing decisions are made completely independent of race and are based solely on an inmate's violent or predatory behavior. If the inmate remains in a double cell, the CDC's goal is for inmates to select their own cell-mate, so as to maximize the inmates' compatibility and minimize the possibility of violence. There are designated forms that both inmates must sign indicating that they would like to share a cell. Unless there are security reasons for not granting an inmate's request to share a cell with another inmate, the CDC will usually grant these requests. Race is not a consideration in such decisions. (*Id.* at 5a.)

Petitioner Garrison Johnson, an African-American prisoner, alleges that the initial double-cell assignment practice violates the Equal Protection Clause. Petitioner alleges that he has been through inmate reception centers at several prisons and at each one he was double-celled with an inmate of the same ethnicity.

The Ninth Circuit found the CDC's practice was reasonably related to legitimate penological interests and concluded that the prison's temporary housing practice does not violate Petitioner's constitutional rights. The Ninth Circuit determined that prison officials may make initial cell assignments using race as a factor in the housing decision. To reach this conclusion, the Ninth Circuit applied this Court's test set out in *Turner v. Safley*, 482 U.S. 78 (1987).

In *Turner*, this Court articulated a reasonableness test with four factors: (1) whether a valid and rational connection exists between the activity and a legitimate governmental interest advanced as a justification; (2) whether, notwithstanding the prison's policy or practice, alternative means exist for the prisoner to exercise the right; (3) what effect an accommodation of the prisoner's constitutional right would have on guards, inmates, and prison resources; and (4) whether an alternative is available to accommodate the prisoner's rights at a *de minimis* cost to valid penological interests. *Id.* at 89-91.

Turner's first prong requires an examination of whether there was a "valid, rational connection" between the prison action and a legitimate penological interest. *Turner,* 482 U.S. 89-90. Under this prong, the court must determine whether the government objective was neutral and unrelated to racial discrimination. (Pet. App. at 14a.) In this case, the court found that prison administrators used race as a factor in making their initial housing assignments, "solely on the basis of [its] potential implications for prison security . . ." (*Id.* at 15a.) The policy was therefore held neutral within the meaning of *Turner*.

The court then analyzed whether the practice was rationally related to the state's interest, and found that it

was. (*Id.* at 15a-22a.) The court reviewed testimony about the serious, ongoing problems that prison officials face with respect to maintaining security for violent inmates. (Pet. App. 16a n.9.)

The Ninth Circuit has recognized the logical connection between prison gangs and violence. *Stefanow v. McFadden*, 103 F.3d 1466, 1472 (9th Cir. 1996) (acknowledging that those familiar with prisons are aware of the seriousness of the problems caused by prison gangs which are fueled by actively virulent racism and religious bigotry.) And the court's opinion cited numerous other instances of racial violence in California's prison yards. (Pet. App. 17a-18a n.9.)

The court concluded that it was reasonable that prison administrators believe using race as one factor in making an initial housing determination is necessary for inmate and staff safety. The court found that *Turner 's* first prong was met. (*Id.* at 22a.)

The Ninth Circuit examined the second factor under *Turner*, the alternative means test. Where other avenues remain available for the exercise of the asserted right, courts should be particularly conscious of the measure of judicial deference owed to corrections officials in gauging the validity of the regulation. *Turner*, 482 U.S. at 90. (Pet. App. 22a-23a.)

The court concluded that alternative means existed for prisoners to exercise their constitutional rights. (*Id.* at 24a.) The rest of the prison is fully integrated. There is no distinction based on race as to jobs, meals, yard and recreational time, or vocational and educational assignments. The classification process is completed within 60 days. (*Id,*) After that, if the inmate remains in a double cell, the CDC's goal is for inmates to select their

own cell- mate, to maximize the inmates' compatibility and to reduce the possibility of violence. Unless there are security reasons for not granting an inmate's request to share a cell with a particular inmate, the CDC will usually grant these requests. Race is not a consideration in such decisions. (*Id.* at 5a.)

Under the third *Turner* factor, the court examined what impact accommodating the inmate's asserted right would have on prison personnel, inmates, and the allocation of prison resources. *Turner*, 482 U.S. at 90.

The court deferred to the CDC's assertion that failing to consider race in making initial housing assignments would lead to increased racial violence both in the cells and in the common areas of the prison. (Pet. App. 25a-26a.) The CDC administrators uniformly stated that failing to take race into account in making initial housing decisions would violate their obligations under the Eighth Amendment to protect inmates from a known danger. *Farmer v. Brennan*, 511 U.S. 825, 827, 831 (1994). (Pet. App. 30a.)

The CDC Director stated:

> If race were to be disregarded entirely . . . I am certain, based upon my experience with CDC prisoners, that there will be problems within the individual cells. These will be problems that the staff will have a difficult time controlling. I believe there will be fights in the cells and the problems will emanate onto the prison yards. With respect to inside individual cells, I do not feel that prison housing staff are adequately able to deal with the problems that could arise . . . I feel that because there are limited staff to oversee numerous cells, it would be very difficult to assist

> inmates if the staff were needed in several places at one time. (Pet. App. 25a-26a.)

The CDC staff represented that the impact of ignoring race in the initial housing assignment would be significant and the court deferred to the administrators' judgment. (*Id.* at 27a.)

Turner's fourth factor examines whether reasonable alternatives exist which would fully accommodate the prisoner's rights at *de minimis* cost to valid penological interests. *Turner*, 482 U.S. at 91. The Ninth Circuit examined the proposed alternatives and determined that there were no reasonable alternatives that would accommodate Petitioner's interest at *de minimis* cost to valid penological interests. (Pet. App. 27a-29a.)

After examining the *Turner* factors, the Ninth Circuit concluded that the CDC's response was reasonably related to the administrators' concern for racial violence and was properly upheld.

REASONS FOR DENYING THE PETITION

I.

THE PETITION SHOULD BE DENIED BECAUSE, EVEN IF *TURNER v. SAFLEY* WERE NOT APPLICABLE TO CLAIMS OF RACIAL SEGREGATION IN INITIAL CELL ASSIGNMENTS, THE PRISON PRACTICE WOULD SATISFY STRICT SCRUTINY.

Petitioner contends that the standard of review applied by the Ninth Circuit in this equal protection case conflicts with this Court's applicable precedents. Petitioner argues that strict scrutiny applies in this case despite the prison environment. But the Ninth Circuit properly applied the more deferential standard consistent with this Court's decisions concerning inmates.

Since *Turner* was decided, this Court's opinions have emphasized that the *Turner* test applies to prisoners' constitutional claims regardless of the standard of review that would be applied outside prison walls. This principle was repeated in *O'Lone v. Shabazz*, 482 U.S. 344 (1987) which held, "To ensure that courts afford appropriate deference to prison officials . . . prison regulations alleged to infringe constitutional rights are judged under a 'reasonableness' test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights." *Id*. at 349. And in *Thornburgh v. Abbott*, 490 U.S. 401 (1989), this Court found that even when strict scrutiny otherwise would apply to the policy in question, the exigencies of prison administration require only that the regulations be reasonably related to a

only that the regulations be reasonably related to a legitimate penological interest. *Id*. at 407–09, 412.

In *Washington v. Harper*, 494 U.S. 210 (1990), the Court was faced with a prisoner's Fourteenth Amendment due process claim and reaffirmed its intent that *Turner* be followed, declaring "we made quite clear that the standard of review we adopted in *Turner* applies to all circumstances in which the needs of prison administration implicate constitutional rights." *Id*. at 223–24.

Petitioner argues that all state racial segregation claims are subject to strict scrutiny regardless of whether they are in the prison context. To support this, he refers to *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Adarand Construction, Inc. v. Pena*, 515 U.S. 200 (1995); *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003); and *Gratz v. Bollinger*, 123 S. Ct. 2411 (2003).

However, Petitioner's conclusion cannot be drawn from these cases because none of them involved the prison environment. None of them required the Court to balance the constitutional claim against the issues of prison management in furtherance of penological interests. Further, none of these cases even implied that *Turner* be disregarded in an equal protection analysis. Indeed, Petitioner's present position was specifically rejected in *Turner*:

> Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration. The rule would also distort the decisionmaking process, for every administrative judgment would be subject to the possibility that

> some court somewhere would conclude that it had a less restrictive way of solving the problem at hand. Courts inevitably would become the primary arbiters of what constitutes the best solution to every administrative problem, thereby "unnecessarily perpetuat[ing] the involvement of the federal courts in affairs of prison administration."

Turner, 482 U.S. at 89, *quoting Procunier v. Martinez*, 416 U.S. 369, 407 (1974).

Thus, by applying *Turner*, the Ninth Circuit used the correct standard of review to evaluate Petitioner's equal protection claim.

Moreover, even if the Court concluded that *Turner v. Safley* was not applicable to claims of racial segregation in cell assignments, the prison's practice would still satisfy strict scrutiny as it is narrowly drawn to serve a compelling state interest. *Grutter v. Bollinger*, 123 S. Ct. at 2337.

The classification process at issue is temporary and completed within 60 days. After that, to minimize potential violence, the inmate is encouraged to select a cellmate with whom he is compatible. The high level of racial violence in the CDC is well documented, and administrators must take appropriate steps to rectify or to reduce further violence, which they have done. The purpose of the temporary race-based cell assignment is to ensure the safety of both Petitioner and his cell-mates.

Finally, there is no disadvantage to the prisoner during this classification process. There is no claim of disparate treatment because none exists. The prison facilities are fully integrated. There is no distinction based on race as to jobs, meals, yard and recreational time, or vocational

and educational assignments.

Thus, even if a strict scrutiny analysis were to be applied, the CDC's practice during the temporary classification period would be upheld because it is narrowly drawn to serve the compelling state interest in reducing prison violence.

II.

THERE IS NO CONFLICT WITHIN THE FEDERAL CIRCUITS THAT WARRANTS REVIEW.

Petitioner argues that the Ninth Circuit's decision conflicts with the decisions of the Fifth, Seventh, Eighth and District of Columbia circuit courts, as to which constitutional standard of review should apply and that this warrants review.

Petitioner cites *Sockwell v. Phelps*, 20 F.3d 187 (5th Cir. 1994), in which the plaintiff class alleged that the prison was violating a consent decree. Unlike this case, the prisoners claimed disparate treatment. Specifically, they claimed that "white cells" received preferential treatment to "black cells," including first access to showers, better telephones and store privileges, and better views of the television. *Id.* at 190. Here, Petitioner makes no claim that African-American inmates received unfavorable cell locations or disparate treatment. Moreover, *Sockwell* does not discuss any particular standard of review for plaintiffs' claim.

Petitioner also refers to *Pitts v. Thornburgh*, 866 F.2d 1450 (D.C. Cir. 1989). That court held that where gender discrimination is based on a facial classification, heightened scrutiny remains the appropriate standard of constitutional review, despite *Turner*. *Id.* at 1453-55. But although *Pitts* was decided after *Turner*, it was decided before the Court's clarifying opinions in both *Thornburgh,* 490 U.S. 401 and *Washington v. Harper,* 494 U.S. at 223-24. Moreover, *Pitts* did not involve prison security or day-to-day prison management concerns.

Petitioner refers to *Black v. Lane*, 824 F.2d 561 (7th Cir. 1987). That case was decided only a few days after *Turner* and failed to include any discussion of *Turner* at all. As with *Pitts*, Seventh Circuit cases after *Turner* clarified that *Turner* established a broad rule to be applied to all cases implicating constitutional rights. *Reed v. Faulkner*, 842 F.2d 960 (7th Cir. 1988); *Hadi v. Horn*, 830 F.2d 779 (7th Cir. 1987).

Finally, Petitioner references *Pargo v. Elliott*, 49 F.3d 1355, 1356–57 (8th Cir. 1995). The Eighth Circuit has since ruled that *Turner* applies in the prison environment and courts must balance the right of the inmate against a state's interest in prison safety and security. *Goff v. Harper*, 235 F.3d 410, 413 (8th Cir. 2000).

The *Turner* analysis applied by the Ninth Circuit in this case is the same analysis applied by another circuit court addressing a similar issue. In *Morrison v. Garraghty*, 239 F.3d 648, 654-55 (4th Cir. 2001), the Fourth Circuit used the *Turner* standard to evaluate a prisoner's equal protection claim based on racial discrimination.

The circuit courts do not conflict concerning whether *Turner v. Safley* applies to equal protection claims in prison cases. The petition for writ of certiorari should be denied.

CONCLUSION

This Court should deny the petition for certiorari because the Ninth Circuit's decision is consistent with this Court's precedent and there is no conflict among the circuits.

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Respectfully submitted,

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